



Judicial Reforms: Now or Never: Part - II

By
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Under the social contract, the people are the real sovereign. In our polity, the balance of power has totally shifted towards the judiciary that controls not only the executive but also parliament, and these two have no role in terms of appointments and removal of judges. This needs to be rectified.

The proceedings of the committee for the appointment of judges are: the committee consists of eight members: four members from the Senate; and four members from the National Assembly.

When the National Assembly is dissolved, the total membership of the committee shall, mutatis mutandis, consist of the members from the Senate only. Out of the eight members of the committee, four shall be from the Treasury Benches, two from each House and four from the opposition benches, two from each House.

The committee on receipt of a nomination from the commission may confirm the nominee by majority of its total membership within 14 days, failing which the nomination shall be deemed to have been confirmed. If a nomination is not confirmed by the committee, it shall forward its decision with reasons so recorded to the commission. If a nomination is not confirmed, the commission shall send another nomination.

The meetings of the committee are held in camera; and Article 69 of the constitution does not apply on committee proceedings – so they are not protected from judicial review.

It is proposed that the opinion of parliament (committee) and not the Judicial Commission be final. It is, therefore, suggested that: the committee on receipt of a nomination from the commission may confirm one of the two nominees for each post by majority of its total membership within 14 days. If

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a nomination is not confirmed by the committee, it shall forward its decision with reasons so recorded to the commission through the prime minister. If a nomination is not confirmed, the Commission shall send other nominations.

The meetings of the committee shall be held in public and there shall be public hearings on the pattern of parliamentary confirmations all over the world. Article 69 of the constitution shall apply on committee proceedings.

The judiciary has de-facto control over the appointments of the judges and it fully and exclusively controls their discipline and removal through the Supreme Judicial Council (SJC) under Article 209 of the constitution.

The current system of removal of judges is not under any democratic control and has miserably failed so far. It is, therefore, proposed that a system like the appointment of judges shall be introduced as under:

The SJC be abolished and a Judicial Commission for appointments in the Supreme Court consisting of ten members shall perform the functions of the SJC. Some other penalties, on the pattern of the penalties under Civil Service Act, 1973 may also be introduced for acts of minor misconduct in addition to removal from service available now.

There is confusion as to whether jurisdiction of the SJC extends to a chief justice or not; it shall be clarified that it does apply. Consequently, the next senior-most judge shall be the member of the SJC. The Judicial Commission shall make a code of conduct for judges and inappropriate observations by a judge shall also be considered misconduct.

The jurisdiction of the Judicial Commission shall also extend to the judges of the FSC. Hearings of the Judicial Commission shall be held in camera unless the judge under enquiry desires otherwise.

The Judicial Commission shall have all powers to hold an enquiry or get enquiry done by any agency. The commission by two-thirds majority shall make its recommendations to parliament.

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If the commission finds misconduct on the part of a judge, then till the final decision by the president, the judge shall not work. The meetings of parliament shall be held in camera unless the judge under enquiry desires otherwise.

A judge of a superior Court shall not be removed from office except by an order of the president who shall pass such an order after resolution by each house of parliament supported by a majority of that House and by majority of not less than two-thirds of the members of that House present and voting.

Article 69 shall apply on parliamentary proceedings; and the president shall act on the recommendations of parliament.

The constitution of the benches in the Supreme Court and high courts is considered to be the prerogative of the chief justices. After the Mustafa Impex case, the constitution of the benches may be illegal, but the practice is still there, and it may continue.

There is a lot of criticism on this power of the chief justice to constitute the benches. And there has also been critique that it is not the court but the chief justice that runs the court including appointments to the courts. It is, therefore, proposed that: all the policy decisions of the Supreme Court, FSC and the high courts shall be made by a full court.

A meeting of the full court shall be held to discuss and review all policy matters at least once in four months. The policy of the constitution of the bench shall be made by the full court and it shall review it in every meeting.

The routine weekly or fortnightly benches shall be made by a Judicial Committee (JC) of that court under overall the policy made by the full court. In case of the high courts, the JC shall consist of the chief justice and four senior-most judges of the court, equitably representing different seats/circuits of the court, (except the Islamabad High Court). In the case of the Supreme Court, the JC shall consist of the chief justice and one senior-most judge of each province serving in the Supreme Court.

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Cases of constitutional importance, political or financial impact, or those that challenge the vires of a legislation shall be heard by a larger bench of the high court consisting of at least five judges equitably representing different seats/circuits of the court, (except the IHC).

In the Supreme Court, cases of constitutional importance, political or financial impact, or those that challenge the vires of a legislation shall be heard by the full court or at least a larger bench consisting of at least 11 judges including at least two judges from each province.

If a law has been declared by the Supreme Court as ultra vires, and parliament re-enacts the same law, then the full court shall hear any challenge if mounted to the law and decide the matter with two-thirds majority.

Under Article 184 (3), without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred is involved, have the power to make an order of the nature mentioned in the said Article.

The jurisdiction of the Supreme Court has been used without any fully developed criterion and has led to a lot of criticism. This is an extraordinary power without any appeal or revision and needs to be structured. It is high time the powers under this omni-clause are structured in the interest of transparency, fairness and justice.

It is therefore suggested that: comprehensive guidelines be laid down where and when this power can and cannot be used; and it shall not be exercised in political matters or in individual cases and only be exercised in cases of general public importance.

This extraordinary power may be exercised by the full court and not by only the chief justice of the Supreme Court. If the full court exercises the jurisdiction, then the full court shall hear the matter and may also hear a review on the principles of appeal.

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If the jurisdiction is not assumed by the full court, then the jurisdiction may be assumed by a five-member bench comprising the chief justice and senior-most judge from each province in the Supreme Court. If the jurisdiction is assumed by the five-member bench, then the matter shall be heard by a bench of 11 judges, having at least two judges from each province. If the matter is heard by the bench of 11 judges, there shall be a special appeal to the full Court.

Concluded.

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